HOUSE OF LORDS SESSION 2007–08

[2008] UKHL 53

on appeal from: [2007]EWCA Civ 478

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

R (on the application of Baiai and others) (Respondents) *v* Secretary of State for the Home Department (Appellant) and one other action (*formerly* R (on the application of Trzcinska and others) (Respondents) *v* Secretary of State for the Home Department (Appellant) and one other action

Appellate Committee

Lord Bingham of Cornhill
Lord Rodger of Earlsferry
Baroness Hale of Richmond
Lord Brown of Eaton-under-Heywood
Lord Neuberger of Abbotsbury

Counsel

Appellant:
Monica Carss-Frisk QC
Angus McCullough
Robert Wastell
(Instructed by Treasury Solicitors)

Respondents (Baiai & Trzcinska):
Rambert De Mello
Satvinder Singh Juss
Adrian Berry
(Instructed by Kamberley as London agents for David Tang & Co)

Respondents (Bigoku Agolli & Tilki):
Manjit Gill QC
James Collins
(Instructed by Sheikh & Co)

Interveners: (Joint Council for the Welfare of Immigrants and the AIRE Centre)

Richard Drabble QC
Eric Fripp
Charles Banner
(Instructed by Dawson Cornwell)

Hearing dates:
23, 24 and 25 JUNE 2008

ON
WEDNESDAY 30 JULY 2008

HOUSE OF LORDS

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

R (on the application of Baiai and others) (Respondents) *v* Secretary of State for the Home Department (Appellant) and one other action (*formerly* R (on the application of Trzcinska and others) (Respondents) *v* Secretary of State for the Home Department (Appellant) and one other action

[2008] UKHL 53

LORD BINGHAM OF CORNHILL

My Lords,

1. This appeal concerns the right to marry protected by article 12 of the European Convention on Human Rights, one of the articles to which domestic effect is given by the Human Rights Act 1998. It provides that "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right". More specifically, the appeal concerns the control of that right by the Secretary of State under and pursuant to section 19 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004. The agreed issue is whether the scheme established by and under section 19 involves a disproportionate interference with (and therefore a breach of) the article 12 right to marry of any or all of the respondents. The Court of Appeal, affirming the first instance judge save on one point, held that it does. The Secretary of State challenges that conclusion.

2. Mr Baiai and Ms Trzcinska met in this country in August 2004 and started a relationship in about October of that year. He is an Algerian national, now aged 37, and a Muslim. He entered the country illegally in February 2002 and has remained here unlawfully since then. He was given temporary admission by an immigration officer on 24 May 2005. Ms Trzcinska, now aged 28, is a Polish national who came to this country as a worker in July 2004 following Poland's

accession to the European Union. She is a Roman Catholic. As a national of the European Economic Area and a worker she has a right to reside in this country. Mr Baiai and Ms Trzcinska stated that they wished to marry before starting a family. On 31 January 2005 Mr Baiai applied to the Secretary of State for his written permission to marry in the United Kingdom pursuant to section 19(3)(b) of the 2004 Act. By letters of 15 February and 15 April that application was refused. On 8 March 2005 Mr Baiai and Ms Trzcinska together issued an application for judicial review of the refusal. Following the order of the Court of Appeal made on 23 May 2007 the Secretary of State issued a Certificate of Approval (CoA) giving Mr Baiai and Ms Trzcinska permission to marry, and they have since married.

3. Mr Bigoku and Ms Agolli, aged 35 and 24 respectively, are both nationals of the Former Republic of Yugoslavia and are both Muslims. Both are of Albanian ethnicity, but his home was in Kosovo and hers in Serbia. He arrived in this country on 28 October 1998 and applied for asylum the next day. On 19 July 1999 he was granted Exceptional Leave to Remain for one year, under a concession then in force, without prejudice to his asylum claim, and this leave duly expired a year later. He was interviewed by the Home Office on 7 June 2001 and his asylum claim was refused 4½ years later. Ms Agolli's date of arrival in this country is not precisely known, but she was granted Exceptional Leave to Remain on 31 January 2003, to expire on 31 January 2007. Mr Bigoku and Ms Agolli applied, separately, for the Secretary of State's written permission to marry on 13 May 2005. There was some delay in considering their applications and on 2 September 2005 they issued a joint application for judicial review. On 15 September 2005 the Secretary of State issued to both respondents a Certificate of Approval, giving them written permission to marry, expiring on 15 December 2005. They married. In the light of this decision these respondents were invited to withdraw their application for judicial review, but they declined to do so.

4. Ms Melek Tilki and Mr Mehmet Ince are both Turkish nationals and both Muslims, aged 20 and 38 respectively. They are cousins and had known each other in Turkey before they came to this country. She arrived on 8 November 2004 and applied for asylum. Her application was refused on 9 December 2004 but she was granted Limited Leave to Remain on a discretionary basis. This leave expired on 4 September 2005 and no further grant of leave has been made. She is therefore an overstayer. Mr Ince had arrived earlier, on 11 September 2001, and had been granted Indefinite Leave to Remain on 22 July 2002. Shortly after Ms Tilki's arrival in this country, in November 2004, she and Mr Ince

investigated the possibility of marriage. In early 2005 she became pregnant and in March 2005 her parents gave their consent to her marrying Mr Ince, such consent being required because she was aged 17. On 22 June 2005 Ms Tilki applied for the Secretary of State's written permission to marry, also challenging the lawfulness of the requirement to seek such permission. This application was refused on 18 July 2005. On 19 September 2005, after expiry of her Limited Leave to Remain, Ms Tilki issued proceedings for judicial review to which Mr Ince was not a party. Three days later, on 22 September 2005, the Secretary of State issued a Certificate of Approval giving Ms Tilki permission (expiring on 29 December 2005) to marry Mr Ince and they were married. She was then invited to withdraw her claim for judicial review but she chose to pursue her challenge.

5. Although enacted nearly 60 years ago, the Marriage Act 1949, amended from time to time since, remains the primary statute governing the solemnisation of marriages in England and (very largely) Wales. It draws a sharp distinction between marriages solemnised according to the rites of the Anglican Church in England or Wales following the reading of banns or the grant of an Archbishop's licence or a common licence ("ecclesiastical preliminaries"), the subject of Part II of the Act, and marriages solemnised on the authority of a certificate of a superintendent registrar, the subject of Part III. The broad effect of the Act is that any marriage not solemnised according to the rites of the Church of England following ecclesiastical preliminaries must be, in effect, licensed by the certificate of a superintendent registrar even if, before or after, a religious ceremony has taken place. This appeal is solely concerned with marriages falling within Part III of the Act.

6. The Immigration Rules, and the right to respect for family life protected by article 8 of the European Convention, confer a measure of protection on some persons having limited or no leave to enter or remain in this country who marry here. This gives rise to an acute and difficult administrative problem: that persons seeking leave to enter or remain in this country may marry here, not for the reasons which ordinarily and legitimately lead people to marry, but in order to strengthen their claims for leave to enter or remain. Such marriages have been variously described as "bogus" and "sham" and as "marriages of convenience". All are descriptions of marriages entered into for the purpose of securing an immigration advantage. It is difficult to improve on the definition (which the Secretary of State accepts as apposite) in article 1 of the EC Council Resolution 97/C382/01 of 4 December 1997 on measures to be adopted on the combating of marriages of convenience, according to which a marriage of convenience is

> "a marriage concluded between a national of a Member State or a third-country national legally resident in a Member State and a third-country national, with the sole aim of circumventing the rules on entry and residence of third-country nationals and obtaining for the third-country national a residence permit or authority to reside in a Member State".

I shall refer to marriages of convenience in that sense.

7. The Resolution just referred to reflected the concern among European states about marriages of convenience so defined. The recitals to the Resolution noted that marriages of convenience constituted a means of circumventing the rules on entry and residence of third-country nationals, described the objective of the Resolution as being not to introduce systematic checks on all marriages with third-country nationals but to provide for checks where there were well-founded suspicions that a marriage was or would be one of convenience and recognised the possibility that member states might check whether a marriage was one of convenience before it was performed. The Resolution listed factors which might provide grounds for believing that a marriage was one of convenience: for example, that matrimonial cohabitation was not maintained, that the spouses had never met before their marriage, that the spouses gave inconsistent particulars of their respective personal histories and circumstances, and that the spouses spoke no common language. The Resolution provided that where there were factors which supported suspicions for believing that a marriage was one of convenience, member states should issue a residence permit or authority to the third-country national on the basis of the marriage only after the competent national authorities had checked that the marriage was not one of convenience and that the other conditions relating to entry and residence had been fulfilled. Such checking might involve a separate interview with each of the spouses. Should the competent authorities find the marriage to be one of convenience, the residence permit or authority granted on the basis of the third-country national's marriage should as a general rule be withdrawn, revoked or not renewed. But the third-country national should have an opportunity to contest or have reviewed, as provided by national law, before a court or competent administrative body, a decision to refuse, withdraw, revoke or not renew a residence permit or authority. Member states were to endeavour to bring their national legislation into line with the Resolution by 1 January 1999.

8. The United Kingdom responded to this Resolution, in part, by enacting section 24 of the Immigration and Asylum Act 1999. This section imposed a duty on (among others) superintendent registrars to report to the Secretary of State any proposed marriage of which notice was given to them in which there were reasonable grounds for suspecting that the marriage would be a "sham marriage". This expression was defined in subsection (5) to mean

> "a marriage (whether or not void) —
>
> (a) entered into between a person ("A") who is neither a British citizen nor a national of an EEA State other than the United Kingdom and another person (whether or not such a citizen or such a national); and
>
> (b) entered into by A for the purpose of avoiding the effect of one or more provisions of United Kingdom immigration law or the immigration rules."

Pursuant to their duty under this section, superintendent registrars reported their suspicions in a considerable number of cases. It was the number of such reports which prompted further action to counter the problem of marriages of convenience, as I prefer to call them.

9. This was the problem addressed, not very explicitly, by section 19 of the 2004 Act. The section applies (subsection (1)) to any marriage which has two features. First, it is a marriage which is to be solemnised on the authority of a certificate issued by a superintendent registrar under Part III of the 1949 Act, thus excluding Anglican marriages following ecclesiastical preliminaries governed by Part II. Secondly, it applies to a marriage where one or other or both parties is or are subject to immigration control. As defined in subsection (4), a person is subject to immigration control if he or she is not an EEA national (as all the respondents save Ms Trzcinska are not) and he or she requires leave to enter or remain in the UK (whether or not such leave has been given) under the Immigration Act 1971, as do all the respondents save Ms Trzcinska. Section 19(2) imposes certain requirements concerning the notice to be given to the superintendent registrar under section 27 in Part III of the 1949 Act in the case of a marriage covered by section 19, but nothing turns on the details of these requirements in this appeal. Subsection (3) of section 19, however, lies at the heart of the appeal. It provides that the superintendent registrar shall not enter in the marriage notice book notice of a marriage covered by the section unless satisfied by the provision of specified evidence that

any party subject to immigration control fulfils one or other of three conditions. The conditions are, first (subsection (3)(a)), that the party has an entry clearance granted expressly for the purpose of enabling him or her to marry in the UK. None of the respondents has such an entry clearance. The second condition (subsection (3)(b)) is that the person has the written permission of the Secretary of State to marry in the United Kingdom. Such permission, as already noted, was originally refused to each of the respondents (save Ms Trzcinska and Mr Ince) but later granted. The third condition (subsection (3)(c)) is that the party falls within a class specified for the purposes of paragraph (c) by regulations made by the Secretary of State. The only class so specified is persons settled in the UK, as defined in the regulations referred to in para 10 below, which refers to the definition in the Immigration Rules. None of the respondents is settled in the UK in that sense, Mr Ince not being a respondent. Thus the appeal concerns the requirement in section 19(3)(b) for persons such as the respondents (other than Ms Trzcinska and Mr Ince) to obtain the written permission of the Secretary of State to marry, and Ms Trezcinska could not of course have been able to marry here had permission not been given to Mr Baiai nor Mr Ince unless permission had been given to Ms Tilki

10. Section 25 of the 2004 Act empowered the Secretary of State to make regulations requiring persons seeking permission to marry under section 19(3)(b) (or other subsections irrelevant for present purposes) to make an application and pay a fee. The regulations were to specify, in particular, the information to be contained in the application, the amount of the fee and the procedure for paying the fee, and further provision might be made for reducing or refunding the fee or exempting a class of persons from paying it. Pursuant to this and other powers the Secretary of State made the Immigration (Procedure for Marriage) Regulations 2005 (SI 2005/15). The fee payable on application to the Secretary of State for written permission to marry under section 19(3)(b) was then fixed at £135, although it has since 2 April 2007 been increased to £295.

11. In February 2005 the Immigration Directorates issued instructions on authority to marry under what was misdescribed as the 2005 Act. It stated that under the Act persons subject to immigration control who wished to marry in the UK must meet an additional qualifying condition before they can give notice of the marriage: they must have an entry clearance or be settled in the UK or (relevantly to this appeal) "have a Home Office certificate of approval". Chapter 1, section 15, para 3, of the Instructions ("Criteria for Granting a Certificate of Approval") makes provision for postal application and states:

> "In order to qualify for a certificate of approval, a person must have valid leave to enter or remain in the UK as follows. He must have:
>
> > been granted leave to enter or remain in the UK totaling (*sic*) more than 6 months on this occasion; and have at least 3 months of this leave remaining at the time of making the application."

The Instructions state that a certificate of approval will be refused if there is good reason to believe that there is a legal impediment to the marriage, as on grounds of age, consanguinity or an existing marriage. A certificate of approval would normally be refused to a person not qualified to be granted one, but a certificate could be granted on compassionate grounds, of which further details were given in Annex NN to the Regulations.

12. Ms Carss-Frisk QC helpfully advanced the Secretary of State's case in a series of propositions which it is convenient to consider in turn. She submitted, first, that the right to marry protected by article 12 is not an absolute right. She relied in particular on the closing phrase of article 12 ("according to the national laws governing the exercise of this right"), on the Strasbourg and domestic case law and on the analogy drawn in some of the cases between article 12 and article 8.

13. If by "absolute" is meant that anyone within the jurisdiction is free to marry any other person irrespective of age, gender, consanguinity, affinity or any existing marriage, then plainly the right protected by article 12 is not absolute. But equally plainly, in my opinion, it is a strong right. It follows and gives teeth to article 16 of the Universal Declaration of Human Rights (1948) and anticipates article 23(2) of the International Covenant on Civil and Political Rights (1966). In contrast with articles 8, 9, 10 and 11 of the Convention, it contains no second paragraph permitting interferences with or limitations of the right in question which are prescribed by law and necessary in a democratic society for one or other of a number of specified purposes. The right is subject only to national laws governing its exercise.

14. The Strasbourg case law reveals a restrictive approach towards national laws. Thus it has been accepted that national laws may lay down rules of substance based on generally recognised considerations of public interest, of which rules concerning capacity, consent, prohibited degrees of consanguinity and the prevention of bigamy are examples

(*Hamer v United Kingdom* (1979) 24 DR 72, para 62; *Draper v United Kingdom* (1980) 24 DR 72, para 49; *F v Switzerland* (1987) 10 EHRR 411, para 32; *Sanders v France* (1996) 87 B-DR 160, 163; *Klip and Krüger v Netherlands* (1997) 91 A-DR 66, 71). But from early days the right to marry has been described as "fundamental", it has been made clear that the scope afforded to national law is not unlimited and it has been emphasised that national laws governing the exercise of the right to marry must never injure or impair the substance of the right and must not deprive a person or category of person of full legal capacity of the right to marry or substantially interfere with their exercise of the right (*Hamer*, above, paras 60, 62; *Draper*, above, paras 47-49; *F v Switzerland*, above, para 32; *Sanders v France*, above, 162-163; *Klip and Krüger*, above, 71; *R and F v United Kingdom*, Appn no 35748/05 unreported, 28 November 2006, p 14). In practice the Strasbourg authorities have been firm in upholding the right to marry, finding in favour of applicants denied the exercise of that right because they were serving prisoners (*Hamer*, above; *Draper*, above) or because of a mandatory delay imposed before entering into a fourth marriage (*F v Switzerland*, above), or because one applicant was the father-in-law of the other and they could only exercise their right if they obtained a private Act of Parliament (*B v United Kingdom* (2005) 42 EHRR 195).

15. A number of the reported cases on article 12 turn on that part of the article which refers to the right to found a family. The facts giving rise to these decisions are again varied: prisoners complaining of the denial of conjugal visits to them in prison (*X v United Kingdom* (1975) 2 DR 105; *ELH and PBH v United Kingdom* (1997) 91 A-DR 61); denial to a husband and wife of the opportunity to enjoy sexual relations while they were both in prison (*X and Y v Switzerland* (1978)13 DR 241); denial to a husband of authority to oppose an abortion undergone by his wife (*Boso v Italy* Appn no 50490/99, 5 September 2002); denial of artificial insemination facilities to a serving prisoner (*Dickson v United Kingdom* (2006) 46 EHRR 419; *R (Mellor) v Secretary of State for the Home Department* [2001] EWCA 472, [2002] QB 13). The Secretary of State relied on these authorities in argument because, although the right to found a family was on occasion described as "absolute" (*X v United Kingdom*, above, 106) it was repeatedly said that where an interference with a right was justified under article 8(2) it would not found a good claim under article 12 (*X and Y v Switzerland*, above, 244; *ELH and PBH v United Kingdom*, above, 64; *Boso*, above, 6; *Dickson*, above, para 41; *Mellor*, above, paras 29, 39). Thus, it was argued, article 12 may permissibly be qualified on grounds such as those which may be relied on under article 8. I do not accept this analysis, for a number of reasons. First, article 12 confers a right, not a right to respect for specified areas of personal life. Secondly, as already noted,

article 12 contains no equivalent to article 8(2). Thirdly, all the decisions mentioned in this paragraph save *Mellor* also reviewed and rejected claims under article 8, with which the right to found a family is very closely linked, if indeed there is not some overlap. Fourthly, all the applicants and the appellant in *Mellor* failed. The Strasbourg authorities have not in practice upheld the right to found a family with the same firmness they have shown in upholding the right to marry.

16. The Strasbourg jurisprudence requires the right to marry to be treated as a strong right which may be regulated by national law both as to procedure and substance but may not be subjected to conditions which impair the essence of the right.

17. The second proposition advanced for the Secretary of State was that conditions on the right to marry that served the interests of an effective immigration policy were justifiable, provided that such measures satisfied the requirement of proportionality. Neither Mr Gill QC and Mr de Mello for the respondents, nor Mr Drabble QC for the interveners (for whose submissions the committee is indebted), accepted the full breadth of this proposition. Reference was made to four authorities in particular.

18. In *A v United Kingdom* (1982) 5 EHRR 296 a disabled UK citizen living on benefits complained of the denial of entry clearance to his Filippino fiancée whom he had never met but wished to marry here. The ground of refusal was that she would be a charge on public funds. The Commission observed that the right to marry did not in principle include the right to choose the geographical location of the marriage and held the refusal of entry to be justified. The case did not involve a genuine marriage between two persons already in the jurisdiction.

19. In *Application No 10914/84 v Netherlands* (1985) 8 EHRR 308 the first applicant (a Moroccan) had come to the Netherlands and obtained a residence permit on the strength of a permanent relationship with a Dutch woman. When that permit expired he sought a new permit which was refused because his relationship had come to an end and he was unemployed. He challenged this refusal on the ground of a relationship with the second applicant, another Dutch woman, but this was refused because she was living on a state benefit and could not support him. The applicants took steps towards getting married, and the first applicant tried unsuccessfully to obtain an order prohibiting his expulsion. It was held that the Dutch authorities were not obliged to

allow the first applicant to stay in the Netherlands in order to marry. In the event, the parties went to Morocco and married. The first applicant then obtained a residence permit to stay with his wife in the Netherlands. The applicants' complaint under article 12 was held to be manifestly ill-founded, and the Commission noted that article 12 did not guarantee the right to marry in a particular country or under a particular legal system. This case, as I understand it, is authority for the proposition that the prospect of marriage need not disrupt the ordinary course of immigration control, but it does not appear from the report that the Dutch authorities did prevent the applicants marrying.

20. The facts and the law as reported in *Sanders v France*, above, are said by the interveners to be incomplete and in part misleading, but the decision must be read in the light of the facts and the law as stated. The applicants, a Turkish man aged 50 and a French woman aged 24, living together in Istanbul, complained of difficulties they encountered at the French consulate general in Istanbul in obtaining a certificate of capacity to marry. To preclude marriages of convenience, French law provided for the issue of a certificate, to be granted on application to State Counsel (in Nantes, in the case of French citizens residing abroad). State Counsel could oppose or postpone a marriage. In the applicants' case the marriage was postponed, but this order was then lifted. There was delay in the applicants' receipt of the certificate, partly because the second applicant declined to collect it, but in the meantime they were married in Istanbul. The applicants' complaint under article 12 was held to be manifestly ill-founded. The issue was held to concern substantive rules the purpose of which was to preclude marriages of convenience between French citizens and aliens, a limitation which was not contrary to article 12. The delay, although regrettable, did not impair the very essence of the right to marry. This decision is clear authority for the proposition that a national law may properly authorise a national authority to delay a proposed marriage between a citizen and a third-country national for a reasonable period to establish whether the marriage is one of convenience.

21. In *Klip and Krüger*, above, the applicants were a Dutch man and a German woman. They had had a relationship since 1987 and had jointly bought a house in 1995. In January 1996 the second applicant applied for a residence permit to stay with the first applicant, which was granted for 1 year, and very shortly thereafter they gave notice of their intention to marry. The first applicant informed the Aliens Department of the intended marriage and at its request provided further information required by law where one intended spouse was not a Dutch citizen. Notification of the intended marriage was accepted, but the applicants

objected to seeking a further statement required by law and to seeking permission of the Aliens Department to marry. They invoked articles 8, 12 and 14 of the Convention. A dispute followed, which was resolved by the issue of the required statement and the parties' marriage. The formalities which gave rise to the dispute were required by a Dutch Act which came into force in 1994 intended to prevent and suppress marriages of convenience. It sought to establish a systematic examination of all marriages involving aliens, and to that end required completion of a standard questionnaire. Only where the Aliens Department had a reasonable suspicion that the intended marriage was one of convenience were certain further steps required. The public prosecutor was competent to oppose a marriage as contrary to Dutch public order where the primary object of one or both of the future spouses was to obtain entry into the Netherlands. The applicants' complaint to the Commission under article 12 was rejected as manifestly ill-founded. It was accepted that the law could prevent marriages of convenience between Dutch citizens and aliens for immigration purposes. The obligation to submit a statement was not objectionable. This case is in my opinion authority for the same proposition as *Sanders.*

22. The Secretary of State's second proposition is in my opinion somewhat too broadly stated. A national authority may properly impose reasonable conditions on the right of a third-country national to marry in order to ascertain whether a proposed marriage is one of convenience and, if it is, to prevent it. This is because article 12 exists to protect the right to enter into a genuine marriage, not to grant a right to secure an adventitious advantage by going through a form of marriage for ulterior reasons.

23. The Secretary of State's third proposition was that such permissible restrictions on the right to marry might affect marriages which were genuine and not only sham marriages. She relied on the authorities referred to above in relation to the second proposition. But they do not establish her proposition. They establish, consistently with the Resolution cited in para 7 above, that a member state may take steps to prevent marriages of convenience. They further establish, again consistently with the Resolution, that where a third-country national proposes to marry within the jurisdiction the member state may properly check whether the proposed marriage is one of convenience or not and seek information necessary for that purpose. The authorities give no support to the proposition that a significant restriction may be placed on all such marriages, or on a sub-class of such marriages, irrespective of

whether they are marriages of convenience or genuine marriages and with no procedure to ascertain whether they are the one or the other.

24. The Secretary of State's fourth proposition was that the assessment of whether the section 19 scheme satisfies the requirement of proportionality essentially involves consideration of whether it strikes a fair balance between the protection of individual rights and the general interests of the community. It has of course been held that the search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights is inherent in the whole of the Convention: *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35, para 69. But I do not think the problem in the present case is aptly analysed in terms of striking a fair balance. Article 12 gives those within the jurisdiction a right to marry. That right is subject to national laws governing its exercise, but the section 19 scheme, taken as a whole, does not fall within the category of national regulatory laws which the closing phrase of article 12 permits, as is clear from the decided cases cited above. Thus the section 19 scheme, insofar as it restricts the right to marry, can be justified only to the extent that it operates to prevent marriages of convenience which, because they are not genuine marriages, do not earn the protection of the right. If the section 19 scheme restricts the right to marry to a greater extent than that, it is disproportionate.

25. The Secretary of State's fifth proposition was that the section 19 scheme involves an area of broad social policy where the judgment of the legislature and executive should be given considerable weight. This proposition is, with respect, too sweeping. There are some features of the section 19 scheme which depend on a political judgment which the court is ill-qualified to assess: such as, for instance, the prevalence of marriages of convenience in this country, the incidence of such marriages in Anglican churches following ecclesiastical preliminaries, the desirability of taking action and the relative merits of seeking to prevent such marriages and seeking to deprive the parties to such marriages after the event of any immigration advantage they might have obtained. But the court cannot abdicate its function of deciding whether as a matter of law the section 19 scheme, as promulgated and operated, violated the respondents' right to marry guaranteed by article 12. The answer to that question does not turn on considerations of broad social policy but on an accurate analysis of the scheme and the law.

26. The Secretary of State's sixth proposition was that the section 19 scheme struck the requisite fair balance. The courts below did not

accept this. Silber J, in the first of three judgments in these proceedings ([2006] EWHC 823 (Admin), [2007] 1 WLR 693), rejected the argument for reasons which he elaborated in paras 46-108 of his judgment. He concluded that the section 19 regime was not proportionate and constituted a substantial interference with article 12 rights. He also held (paras 109-150) that the scheme was discriminatory and so violated article 14 of the Convention in conjunction with article 12, a conclusion which the Secretary of State accepted and did not seek to challenge on appeal.

27. For reasons given by Buxton LJ the Court of Appeal agreed with the judge that the section 19 scheme was disproportionate and violated article 12 (Waller, Buxton and Lloyd LJJ: [2007] EWCA Civ 478, [2008] QB 143). But it disagreed with a conclusion reached by the judge in a third judgment relating to Mr Baiai ([2006] EWHC 1454 (Admin), [2007] 1 WLR 735), in which he had upheld the refusal of a certificate of approval to him on the ground that he was an illegal entrant. The Court of Appeal held (para 61) that the immigration status of Mr Baiai was irrelevant to the genuineness of his proposed marriage, which alone could properly determine whether he should be free to exercise his right to marry.

28. I very largely agree with the comprehensive reasons given by the judge in his first judgment and by the Court of Appeal, and in the light of conclusions already expressed can summarise my own reasons relatively briefly.

29. Apart from its discriminatory features, which the Secretary of State has said she will remove, I do not think section 19, read alone, is legally objectionable. It is open to a member state, consistently with article 12, to seek to prevent marriages of convenience. There is nothing in the text of section 19 which authorises or requires the withholding of permission to marry in the case of any marriage which is not a marriage of convenience. Indeed, the section makes no reference to marriages of convenience or sham marriages and gives no hint of the grounds on which permission may be granted or withheld. Section 19 could be operated, consistently with its terms and with article 12, in a manner which required persons subject to immigration control to give notice of a proposed marriage, enabled an appropriate authority to investigate whether the proposed marriage would be one of convenience and provided for the withholding of permission only in cases where it appeared that the proposed marriage would be one of convenience.

30. Subject to one qualification, the 2005 Regulations are similarly, in my opinion, unobjectionable. They provide in some detail in Schedule 2 for the information to be given by an applicant for permission to marry, and considerable detail (more than is required in the Schedule) is clearly necessary if enquiry is to be made whether a proposed marriage will be one of convenience. My qualification relates to the prescribed fee. It is plain that a fee fixed at a level which a needy applicant cannot afford may impair the essence of the right to marry which is in issue. A fee of £295 (£590 for a couple both subject to immigration control) could be expected to have that effect.

31. The Immigration Directorates' Instructions, promulgated (it is understood) without express parliamentary sanction, provide for the denial of permission to marry (save on compassionate grounds, relatively rarely allowed in practice) to all those who are in the country without leave, or whose grant of leave to enter or remain in the UK on the occasion in question did not total more than 6 months, or who did not have at least 3 months remaining at the time of making the application for permission. The vice of the scheme is that none of these conditions, although of course relevant to immigration status, has any relevance to the genuineness of a proposed marriage, which is the only relevant criterion for deciding whether permission should be given to an applicant who is qualified under national law to enter into a valid marriage. It may be that persons falling within the categories specified in the Instructions are more likely to enter into a marriage of convenience than others, and that may be a very material consideration when the genuineness of a proposed marriage is investigated. But the section 19 scheme does not provide for or envisage any investigation at all, because (as has been explained in the evidence) such investigation is too expensive and administratively burdensome. Thus, subject to the discretionary compassionate exception, the scheme imposes a blanket prohibition on exercise of the right to marry by all in the specified categories, irrespective of whether their proposed marriages are marriages of convenience or whether they are not. This is a disproportionate interference with exercise of the right to marry.

32. For reasons given in para 29 above I would set aside the declaration of incompatibility made in the courts below (save as to discrimination). Section 19(3)(b) of the 2004 Act should be read as meaning "has the written permission of the Secretary of State to marry in the United Kingdom, such permission not to be withheld in the case of a qualified applicant seeking to enter into a marriage which is not one of convenience and the application for, and grant of, such permission not to be subject to conditions which unreasonably inhibit exercise of

the applicant's right under article 12 of the European Convention". Subject to that correction I would dismiss the appeal. I would invite the parties to make written submissions on costs within 14 days.

LORD RODGER OF EARLSFERRY

My Lords,

33. I have had the privilege of considering the speeches of my noble and learned friends, Lord Bingham of Cornhill and Baroness Hale of Richmond, in draft. I agree with them and, for the reasons they give, I too would set aside the declaration of incompatibility (save as to the discrimination between civil and Anglican marriages) and dismiss the appeal, subject to the correction which Lord Bingham proposes.

BARONESS HALE OF RICHMOND

My Lords,

34. A "sham" marriage is still a valid marriage in English law. "The fact is that in the English law of marriage there is no room for mental reservations or private arrangements regarding the parties' personal relationships once it is established that the parties are free to marry one another, have consented to the achievement of the married state and observed the necessary formalities" (*Vervaeke v Smith* [1983] 1AC 145, 152 per Lord Hailsham of St Marylebone LC). This has long been recognised as a rule of public policy. The ecclesiastical courts from whom our marriage law was derived did not want parties to an apparently valid marriage claiming that it was void because of some private reluctance to accept all of the obligations it entailed. How would one single out which obligations were essential and which not? There are many happily married couples who do not live together and many more who do not have children together. Nor are all so-called "sham" marriages entered into for "a nefarious purpose"; as Lord Simon of Glaisdale has pointed out, "Auden married the daughter of the great German novelist, Thomas Mann, in order to facilitate her escape from persecution in Nazi Germany" (*Vervaeke v Smith*, at p 164; for another

example of an altruistic sham marriage see *Silver v Silver* [1955] 1 WLR 728).

35. This means that the authorities are not free simply to disregard those marriages which they believe have been entered into purely in order to gain some perceived immigration advantage. No doubt such marriages do take place. No doubt also they are difficult to detect, not least because of the difficulty of unpicking the variety of reasons why two people might choose to marry one another. There are many perfectly genuine marriages which may bring some immigration advantage to one or both of the parties depending on where for the time being they wish to make their home. That does not make them "sham" marriages.

36. It is not disputed that the Government would be free to deny any immigration advantage to a party to a marriage which had been entered into solely for the purpose of obtaining that advantage. (Indeed, the respondents argue that that is already the case, as the claimed advantages apply only to real relationships.) But the scheme in issue here does something very different. The legislation enables the Government to prohibit in advance a great many marriages irrespective of whether or not they are genuine, irrespective of whether or not there is any immigration advantage to be obtained thereby, and without any right of appeal other than judicial review. This strikes at the very heart of the right to marry which is guaranteed to everyone of full age by article 12 of the European Convention on Human Rights.

37. Section 19 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 applies to all marriages which are to be solemnised on the authority of a superintendent registrar's certificate under the Marriage Act 1949 where a party is subject to immigration control (s 19(1)). It does not apply to marriages conducted according to the rites of the Church of England on the authority of ecclesiastical preliminaries. This is discriminatory. It is also irrational as the Church of England believes itself (with some Parliamentary encouragement, for example in sections 57 and 58 of the Matrimonial Causes Act 1857) required to marry for the first time anyone who lives in the parish regardless of faith or the lack of it. Silber J made a declaration of incompatibility which we were told was designed to cover this aspect of the scheme (although directed at section 19(3) rather than section 19(1), which is the source of the discrimination) and the Government has accepted that this needs to be put right if the scheme survives.

38. But there are many more objections to the scheme than that. It covers anyone who is subject to immigration control, that is, anyone who is not an EEA national and requires leave to enter or remain in the United Kingdom (s. 19(4)). This covers all non-nationals unless they have already acquired the "right of abode". All of these people are required to give notice to the registrar in specified registration districts, irrespective of where they live or intend to get married; and both parties to the intended marriage must attend in person to deliver their notice (s. 19(2)). This is all irrespective of how long they have been living here, how close their relationship and how small or non-existent the immigration advantage there might be.

39. When they get to the registrar, there are only two categories of people who need go no further. The first is a person who has been given entry clearance expressly for the purpose of enabling him to marry in the United Kingdom (s 19(3)(a)). The second is a person who falls within a class specified in regulations (s 19(3)(c)). Regulation 6 of the Immigration (Procedure for Marriage) Regulations 2005 (SI 2005/15) specifies a person "who is settled in the United Kingdom" within the meaning of paragraph 6 of the Immigration Rules. This basically means someone who is ordinarily resident here, not in breach of the immigration laws, and without any restriction on the period for which he may remain. A very large number of people who have been here lawfully for a long time will still not be "settled" here in this sense.

40. Everyone subject to immigration control who does not fall within those two exceptions cannot marry without the written permission of the Secretary of State to marry in the United Kingdom (s. 19(3)(b)). Application must be made in writing accompanied by the fee prescribed in the 2005 Regulations, which is now £295. If both parties require permission, therefore, they must pay £590 to apply for it. There is no power in the regulations to waive or reduce the fee no matter how meritorious the case. This is on top of the much more modest fees for the actual marriage, of £30 for each notice to marry, £40 for the ceremony, and £3.50 for the marriage certificate, making a total of £103.50. It must be a positive disincentive to couples whose desire to marry is deep and sincere and has nothing to do with their immigration status or where they intend to live once married.

41. None of these applicants will be able to find out from the Act or the Regulations how good their chances are of getting permission. On the face of it, the Government can adopt whatever policy it chooses without even laying it before Parliament for scrutiny. The current policy

is contained in the published "Immigration Directorates' Instructions", chapter 1, section 15. This does not depend upon any reasonable assessment, either of the immigration advantage which the marriage might bring, or of the genuineness of the relationship. It depends upon a rule of thumb: permission will be granted if each person needing it has been granted leave to enter or remain in the UK for more than six months (calculated from when his present stay in the UK first began) and has at least three months of this remaining when he makes the application. Even within this category, permission will be refused if there is good reason to believe that either of the parties lacks capacity to marry in English law. Outside this category, permission will be refused unless "there are exceptionally compassionate features" making it unreasonable to expect them to travel, either to marry abroad or to apply for entry clearance from abroad. The examples given are pregnancy or some other condition making the person unfit to travel abroad. They do not include features suggesting that the marriage is genuine, because that is not the point.

42. This policy automatically excludes all asylum seekers because they do not have leave to enter. The policy states that they should not normally be permitted to marry until after their claims have been determined. But if an initial decision on an application or an appeal has been outstanding for 18 months (and we understand that time starts running afresh once an appeal has been lodged), or if they cannot be expected to travel abroad for compelling compassionate reasons, the permission may be granted. It is, of course, extremely unlikely that any genuine asylum seeker will be in a position to travel back to the country from which he has fled to escape a well-founded fear of persecution, nor would it be consistent with this country's obligations under the Refugee Convention to compel him to do so.

43. It is an indication of how over-inclusive the statutory scheme is that the great majority of applications for permission are granted. From 1 February 2005, when section 19 came into force, until 10 April 2006, when Silber J handed down his first judgment, 14,787 applications for permission to marry or enter a civil partnership were dealt with. 12,754 were granted, only 41 of these on exceptional or compassionate grounds, the rest because they met the leave criteria. 1,805 were refused. 228 were withdrawn or discontinued. We are told that this was quite deliberate. The Government simply decided to subject a large number of proposed marriages to the deterrent effect of scrutiny and to prohibit all those in the class which they thought most likely to contain the suspect unions. Making a serious attempt to distinguish between the "sham" and the genuine was considered too difficult and too expensive.

44. My Lords, this scheme is an arbitrary and unjust interference with the right to marry, which is recognised internationally in article 16.1 of the Universal Declaration of Human Rights and article 23.2 of the International Covenant on Civil and Political Rights and regionally in article 12 of the European Convention on Human Rights. Article 16.1 was specifically aimed against bans on mixed marriages, between people of different races or religions or nationalities, such as had existed during the Nazi regime in Germany and continued to exist in some States of the United States until the decision of the Supreme Court in *Loving et ux. v Virginia* 388 US 1 (1967). As Chief Justice Warren then said "Marriage is one of the 'basic civil rights of man', fundamental to our very existence and survival". Even in South Africa, where marriage is not constitutionally protected because of fears that this might entrench a particular model of marriage within a multi-cultural society, "the provisions of the constitutional text would clearly prohibit any arbitrary state interference with the right to marry or to establish and raise a family. The text enshrines the values of human dignity, equality and freedom" (see *Minister of Home Affairs v Fourie*, Case 60/04, Constitutional Court of South Africa, para 47, per Sachs J). Denying to members of minority groups the right to establish formal, legal relationships with the partners of their choice is one way of setting them apart from society, denying that they are "free and equal in dignity and rights".

45. Even in these days, when many in British society believe that there is little social difference between marrying and living together, marriage still has deep significance for many people, quite apart from the legal recognition, status, rights and obligations which it brings. "Marriage law . . . goes well beyond its earlier purpose in the common law of legitimising sexual relations and securing succession of legitimate heirs to family property. And it is much more than a piece of paper." (Sachs J, para 70). It brings legal, social and psychological benefits to the couple when they marry, while they are married and when it ends. Denying those benefits to a couple whose relationship is genuine is neither a rational nor a proportionate response to the legitimate aims of a firm and fair immigration policy.

46. I say that because it has been suggested that article 12 should be read as a qualified right, interference with which may be justified in the same way that interference with the right to respect for family life may be justified under article 8(2). As my noble and learned friend Lord Bingham of Cornhill has explained, although that may be the case where the right to found a family under article 12 overlaps with the right to respect for family life under article 8, there is nothing in the Strasbourg

jurisprudence to suggest that it applies to the basic right to marry. The "national laws governing the exercise of this right", referred to in article 12, are principally those governing its formalities. As the joint working party of the Law Commission and the Registrar General stated, in the Annex to the Law Commission's Report on Solemnisation of Marriage in England and Wales (1973, Law Com No 53, para 4) "the purpose of a sound marriage law is to ensure that marriages are solemnised only in respect of those who are free to marry and have freely agreed to do so and that the status of those who marry shall be established with certainty so that doubts do not arise, either in the minds of the parties or in the community, about who is married and who is not". Article 12 does also envisage national laws governing the capacity to marry, but these must obviously be non-discriminatory and consistent with the fundamental principles of dignity, equality and freedom which underlie the whole Convention. They might include preventing "sham" marriages which are entered into solely for some purpose which has nothing to do with the relationship between the parties. But for all the reasons already explained, this scheme is not rationally aimed at that target.

47. For these reasons, which are simply a footnote to those given by Lord Bingham, with whom I entirely agree, I too would dismiss these appeals. The declaration of incompatibility made by Silber J and upheld in the Court of Appeal, should be amended to read "section 19(1)" rather than "section 19(3)," to make it clear that it is directed solely at the discrimination between civil and Anglican preliminaries to marriage.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

48. I have had the advantage of reading in draft the opinions of my noble and learned friends, Lord Bingham of Cornhill and Baroness Hale of Richmond. I agree with both of them and, for the reasons they give, I too would dismiss the appeals and make the order proposed.

LORD NEUBERGER OF ABBOTSBURY

My Lords,

49. I have had the advantage of reading in draft the opinions of my noble and learned friends, Lord Bingham of Cornhill and Baroness Hale of Richmond. I agree with both of them and, for the reasons they give, I too would dismiss the appeals and make the order proposed.